(2)

95-2062

No.

Supreme Court, U.S.
FILED
OCT 30 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

MULTNOMAH COUNTY, OREGON; JANET BOWDLE; and GEORGE KARCHER,

Petitioners,

v.

STEPHANIE G. PIERCE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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46 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

COUNTERSTATEMENT OF THE CASE

A. The Arrest.....1
B. Detention at MCDC.....2
C. Assault by Defendant Karcher.....5
D. Assault by Defendant Bowdle.....8
E. The Jury Instruction.....9

REASONS FOR DENYING THE WRIT.....10

I. PLAINTIFF WAS NOT DETAINED IN THE USUAL FASHION. UNLIKE THE USUAL PREARRAIGNMENT DETENTION, PLAINTIFF'S CUSTODY WAS NOT LAWFUL, NOR WAS IT A CONTINUATION OF HER ARREST.....11

II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE CONSTITUTIONAL STANDARD FOR EXCESSIVE FORCE CLAIMS BROUGHT BY DETAINEES HELD PURSUANT TO A WARRANTLESS ARREST.....15

III. IT IS NOT REASONABLE TO ALLOW A POLICE OFFICER UNFETTERED POWER TO PUNISH PERSONS SUSPECTED OF A MINOR OFFENSE BY SUBJECTING THEM TO CONDITIONS AND RESTRICTIONS DESIGNED FOR DANGEROUS CRIMINALS.....21

CONCLUSION.....26

TABLE OF AUTHORITIES

CASES

Albright v. Oliver, ___U.S.___,114 S.Ct. 807 (1994), reh. denied, 114 S.Ct. 1340.....23
Arizona v. Evans, 115 S.Ct. 1185, 1192 (1996).....13
Austin v. Hamilton, 945 F.2d 1155 (10th Cir. 1991.)..20
Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861(1979).....24,25
Bender v. Bromley, 1 F.3d 271 (5th Cir. 1993).....18
Boswell v. Sherbourne County, 849 F.2d 1117 (8th Cir.1988).....22
Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir. 1994), cert. denied ___U.S.___, 115 S.Ct. 639 (1994).....18
Cooper v. Dyke, 814 F.2d 941 (4th Cir.1987).....17
County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661 (1991).....23,24
Farmer v. Brennan, 114 S.Ct. 1970 (1994).....21,25
Frohmader v. Wagner, 958 F.2d 1024 (10th Cir. 1992)...20
Garcia v. City of Chicago, Ill., 24 F.3d 966, 970 n.6 (7th Cir. 1994).....20
Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975).....19,23,24
Graham v. Connors, 490 U.S. 386, 109 S.Ct. 1865(1989).....12,22,23
Hudson v. McMillan, 503U.S.___, 112 S.Ct.995(1992).....18
Illinois v. Lafayette, 462 U.S. 640, 645 (1983).....24
Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), cert. denied 414 U.S. 1039, 94 S.Ct.462.....12
Kinney v. Indiana Youth Center, 950 F.2d 462 (7th Cir. 1991).....19
Masters v. Crouch, 872 F.2d 1248 (6th Cir. 1989).....22
Powell v. Gardner, 891 F.2d 1039 (2d Cir. 1989) 16
Reed v. City of Chicago, 77 F.3d 1049, 1052 (7th Cir. 1996).....19
Sweatt v. Bailey, 876 F.Supp. 1571 (M.D. Ala. 1995)...12

Telfair v. Gilberg, 868 F.Supp 1396 (S.D. Ga. 1994)...22
Tennessee v. Garner, 471 U.S. 1 (1985).....23
Titran v. Ackman, 893 F.2d 145 (7th Cir. 1990).....12
United States v. Henlsley,
469 U.S. 221, 105 S.Ct. 675 (1985).....13
U.S. v. Cobb, 905 F.2d 1039 (4th Cir. 1990).....16,17
U.S. v. James Daniel Good Real Property,
114 S.Ct.492,499 (1993).....23
U.S. v. Myers, 972 F.2d 1566 (11th Cir 1992),
cert. denied ___U.S.___ 21
Valencia v. Wiggins, 981 F.2d 1440 (5th Cir.1993),
cert. denied 113 S.Ct. 2998 (1993).....18,19
Villanova v. Abrams, 972 F.2d 792 (7th Cir. 1992).....20
Vineyard v. County of Murray, GA.,
990 F.2d 1207 (11th Cir. 1993).....20
Watt v. Richardson, 849 F.2d 195 (5th Cir. 1988).....22
Whiteley v. Warden, 401 U.S. 560,
91S.Ct. 1031 (1971).....12
Whitley v. Albers, 475 U.S. 312 (1986).....21
Whren v. U.S. 116 S.Ct. 1769 (1996).....11
Wilson v. Williams,
83 F.3d 870, 877 (7th Cir. 1996).....21

STATUTES AND RULES

Oregon Revised Statutes
ORS 133.045.....4
ORS 133.055.....4
ORS 133.310.....4
ORS 153.110.....3
ORS 161.505.....3
ORS 161.515.....3
ORS 161.565.....3
ORS 161.575.....3
ORS 162.385.....3

MCDC Operational Procedures
010.112.036.....4
010.112.041.....5
010.112.053.....4

Bureau of Police General Orders
830.00.....3,4
860.30.....4

Police Standard Operating Procedure, Attch. A...5

Tri-Met Code
TMC 29.15.....3
TMC 29.35.....3
TMC 29.40.....3

APPENDIX

Tri-Met Code 29.15.....App.1
Tri-Met Code 29.35.....App.1
Tri-Met Code 29.40.....App.1

ORS 133.045.....App.2
ORS 133.055.....App.2
ORS 133.310.....App.2
ORS 153.110.....App.3
ORS 161.505.....App.3
ORS 161.515.....App.3
ORS 161.565.....App.4

MCDC OP 010.112.036.....App.5
MCDC OP 010.112.041.....App.5
MCDC OP 010.112.053.....App.5

Defendant Duncan's Custody Report.....App.6
Defendant Duncan's Misdemeanor Citation.....App.8
Fare Inspector's Citation.....App.9
Defendant Karcher's Hazard Report.....App.10
Defendant Karcher's Information
Follow Up Report.....App.12
Betty Evans' Information Follow Up Report....App.13
Police SOP Attachment A.....App.14

COUNTERSTATEMENT OF THE CASE

Petitioners have selectively ommitted and misstated facts that are necessary for a proper analysis of the constitutional issues in this case. A balanced look at the facts underscores the central aspect of the case: Respondent was an innocent arrestee wrongfully detained.

The Arrest

All parties stipulated that on September 12, 1988, as respondent (plaintiff below) was walking away from her store to catch a light rail train she was asked to call an ambulance for a comatose transient, and that she returned to her store and made the call at 5:20 p.m.(Reporter's Transcript (T) 14).

Plaintiff then waited about five minutes on the corner for the ambulance, which pulled up just as the light rail train was arriving one block away. Plaintiff ran and caught the train as it was leaving the stop without buying an 85 cent transfer from the ticket machine first. Plaintiff had already purchased three transfers that day, but was unable to locate the most recent one while making the call for the ambulance.

At 5:30 p.m. plaintiff was taken off the train by a fare inspector to be cited for no proof of fare. Becauseplaintiff did not have identification with her, the fare inspector called a Portland police officer, defendant Duncan, to verify her identity.

Plaintiff gave defendant Duncan her name, date of birth, her store address, her permanent residence address, zip codes, and two phone numbers at which she could be reached. The information plaintiff gave corresponded with what was available to defendant Duncan through the Portland police data base for the name Stephanie G. Pierce. When plaintiff refused to give her social security number to the fare inspector she was arrested.

Detention at MCDC

Plaintiff was presented for custody at Multnomah County Detention Center (MCDC) at 6:26 p.m. with the following paperwork: 1) defendant Duncan's custody report (App.6-7); 2) Defendant Duncan's misdemeanor citation charging plaintiff with the crime of furnishing false information to a police

officer (App.8)[1]; and 3) the fare inspector's infraction citation for non-payment of fare (App9).[2] On the custody report defendant Duncan marked probable cause as the basis for custody and left blank the box denoting cite in lieu. He also wrote a "lieu of cite" number and noted that the offense carried a $1500 bail.[3]

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[1] *Oregon Revised Statutes (ORS) 162.385 "A person commits the crime of giving false information to a peace officer for a citation if the person knowingly uses or gives a false or fictitious name, address or date of birth to any peace officer for the purpose of the officer's issuing or serving the person a citation under authority of ORS 133.045 to 133.080, 133.110 and 156.050."*

2 *Non-payment of Fare is an infraction offense, as is furnishing false information to a fare inspector. Tri-Met Code 29.15 (B), (E); Tri-Met Code 29.35. (App.1) An infraction is not a crime in the state of Oregon. ORS 161.505,. 515, .565, .575. (App.3-4) Custodial arrest is not authorized for an infraction offense. ORS 153.110(3)(App.3); Tri-Met Code 29.40(App.1). On the non-payment of fare violation the fare inspector indicated that bail was $36.00.*

[3] *For that reason, petitioners' assertion that defendant Duncan gave the staff at MCDC a custody report that included a cite-in-lieu is not true. In fact, he gave them just the opposite. The custody report that defendant Duncan gave the MCDC staff was marked for a <u>probable cause</u> custodial arrest, not a cite in lieu arrest. A probable cause custodial arrest can be made for any Felony, Class A Misdemeanor or any unclassified offenses for which the maximum penalty allowed is equal to, or greater than, that allowed for a Class A Misdemeanor (1 year imprisonment and*

The custody report stated that there was no charge other than furnishing false information listed in the narrative. In the narrative, defendant Duncan wrote: "Defendant gave me a name/DOB/address. The address did not sound like a residential area...I asked her why she lied about her address and she stated the Ankeny address is her store." (App.7)

During plaintiff's detention at MCDC she was tracked as a cite-in-lieu.[4] *The change in her*

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a $2500, fine). Bureau of Police General Order 830.00. On the other hand, Oregon statutes classify certain minor crimes for which citation alone is discretionary on the part of the officer. ORS 133.045, 133.055, 133.310. (app.2) The officer is authorized to issue a citation in lieu of custody based on the following guidelines: 1) Identity has been reasonably established; 2) officer reasonably believes offender will appear in court; 3) defendant not needed for further discussion of the case; 4) defendant resides, works, or attends school within court jurisdiction. Bureau of Police General Orders Section No. 860.30. In the event the offender meets the guidelines but verification of identity is needed, the officer has the authority to make a cite in lieu custodial arrest. Id.

[4] *Those booked in as cite-in-lieu are tracked separately and noted for identification processing only. MCDC Operational Procedure (MCDC OP) 010.112.036. (App.5) Contrary to petitioners' assertions, a cite in lieu must be released two hours after identification processing begins, regardless of whether a positive identification is made or not. MCDC OP 010.112.041,*

status from probable cause to cite in lieu was made by the MCDC staff pursuant to defendant Multnomah County's policy of accepting detainees on "special request by officers and/or detectives on minor infractions [to be] booked as cite in lieus for the purpose of obtaining fingerprints and a mug pho- to".[5]

The assault by defendant Karcher

Plaintiff was removed from the sally port cell for

010.112.053 (App.5). Initiation of the identification process was not dependent on justification for the detention, however, and even for a minor offense could be delayed indefinitely. (T419-424, 502, 548-49, 586,600, 605-607, 627). In plaintiff's case, it was delayed two hours, during which time she remained handcuffed with her hands behind her back in a cell.

[5] *Portland Police Standard Operating Procedure, Mug Shot Policy, Attachment A (App.14). The written SOP was not introduced as evidence at trial, but the attorney for defendant City of Portland repeated many times to the judge at the pretrial conference and in his motion for directed verdict that this was the official policy of the City of Portland and, by necessary implication, of Multnomah County (Pretrial Conference Transcript, pp.4-7, 82-83; T 485-486). At trial two officers testified as to the existence of this policy as well (T 402-403, 412-13, 421-22). See also Appellant's Brief, p.23, n.6.*

booking sometime between 6:26 and 8:43.[6] During the booking process, plaintiff was alone with two corrections officers, Betty Evans and defendant George Karcher (T589, T639-40,646).[7] Defendant Karcher was two feet to the right of plaintiff, inventorying the contents of plaintiff's pockets, while Betty Evans, one foot behind plaintiff on the left, emptied them.

When the missing transfer for the light rail train

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[6] At trial plaintiff testified that she was removed from the sallyport cell two hours after her arrival, at approximately 8:20. According to petitioners, plaintiff was removed at 7:30. The evidence is conflicting, however: Petitioners testified that a visit to the nurse was the last part of booking. The nurse's report indicated that plaintiff was brought before her at 7:29. Defendant Karcher's incident report stated that the incident with plaintiff occurred during booking at 8:00 p.m. and that booking was resumed at 9:20. Plaintiff's custody report was time-stamped on the back that she entered MCDC at 6:26 and was in Cell RB02 (the second cell she was placed in after being assaulted by defendant Karcher) at 8:43. The date and time of each inmate movement, cell assignment and transfer to/from reception is stamped on the back of the federal time document. MCDC Post Orders, Intake/Holding Area I.

[7] At the time, plaintiff was 5'4" tall and weighed approximately 110 pounds (T615). Defendant Karcher was 6' tall and weighed approximately 185 pounds (T654). Betty Evans was 5'4" and weighed approximately 165 pounds (T609). In addition, there were heavy security doors that could be automatically closed to separate the booking area from the rest of the jail in the event of a disturbance (T582).

that plaintiff had been unable to locate during the call for the ambulance was removed by Officer Evans, plaintiff asked defendant Karcher if he would list it on her property receipt. Defendant Karcher refused plaintiff's request three times (T 649-50). According to contemporaneous reports filed by both Betty Evans and defendant Karcher the behavior that resulted in the use of a "hairhold" by defendant Karcher was the fact that plaintiff turned and walked away from defendant Karcher (App.10-13).[8] *After the hairhold Defendant Karcher physically placed plaintiff in a second cell, RB02.*

Defendant Karcher and Betty Evans both testified that a potential for violence was not a factor at the time of defendant Karcher's assault on plaintiff, nor was either one of them in fear for their personal safety. (T 618, 651, 655) The hairhold was used to "subdue" plaintiff. (T 618) It was "the quickest way to get control of the situation."(T 636)

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[8] *Both defendant Karcher and Betty Evans testified at trial that the reports were more accurate than their independent memory of the incident (T 614, 660-62). Plaintiff's version of the events is completely different, but because the jury found in defendant Karcher's favor, this version of events is used as a worst case scenario of what she allegedly did to warrant application of a "hairhold", a pain compliance technique, see T692, 711..*

The assault by defendant Bowdle

At approximately 9:20 p.m. plaintiff was removed from cell RBO2 to get a mug shot taken and then was returned to the cell. At approximately 10:10 plaintiff was removed from the cell again for release.[9] *She asked officer Buffington for defendant Karcher's name. (RT721). Defendant Bowdle came over upon hearing this and plaintiff asked defendant Bowdle for defendant Karcher's name. Defendant Bowdle did not respond except to tell plaintiff to go to release. After plaintiff continued to ask for defendant Karcher's name, defendant Bowdle returned plaintiff to her cell by means of a "hairhold" and wrist lock.*[10]

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[9] *The release procedure involved going down a hall to an elevator and then stopping at the property window to get property back (T699).*

[10] *Although the jury found for defendant Bowdle on the issue of excessive force, plaintiff's claim against Bowdle for an unconstitutional seizure has been renewed. For that reason, plaintiff includes her version of the relevant events that led to being returned to cell RB02 by defendant Bowdle: Immediately upon hearing plaintiff ask for defendant Karcher's name, defendant Bowdle ran over to plaintiff and said "Do you want to leave or do you want to stay." Plaintiff said she wanted to leave but she wanted to get the name of the officer who yanked her by her hair. Defendant Bowdle told plaintiff "Fine, if you don't want to go, you don't get to go," and, after motioning for Officer Buffington's assistance, immediately bent plaintiff's wrist and arm*

Plaintiff was released from MCDC at 10:20 p.m.

The Jury Instruction

Petitioners characterize the jury instruction pertaining to the use of force by defendants Karcher and Bowdle as being based exclusively on a 14th Amendment standard, not an Eighth Amendment standard. The instruction is quoted below:

> *The law recognizes that sometimes guards at detention facilities may be required to quell disturbances and restore order.*
>
> *You must determine whether the force used by defendants Bowdle or Karcher was applied in a good-faith effort to maintain or restore discipline, or whether the force used was applied maliciously and sadistically for the purpose of causing harm to the plaintiff. In making this determination, you are to consider such things as the need for the application of force, the rela tionship between the need and the amount of force that was used, and the extent of the injury.*

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up behind her shoulder and proceeded to pull plaintiff by the hair on the top of her head back to RB02 (T122-23).

REASONS FOR DENYING THE WRIT

This Court should deny the petition for Writ of Certiorari for the following reasons:

1. This case would have limited precedential effect because the facts are atypical.

a. Plaintiff's arrest was admittedly without probable cause.

b. Plaintiff was knowingly accepted at MCDC without probable cause, an atypical independent post-arrest seizure.

c. Plaintiff was knowingly returned to her cell after she had been designated for release, a third atypical seizure.

2. The Ninth Circuit's opinion in this case is consistent with decisions in those Circuits that have addressed the issue.

3. Application of the Fourth Amendment in this case is consistent with this Court's prior decisions.

a. The constitutional violations at issue happened while plaintiff was being detained for verification of identity incident to an arrest that was justified solely on the basis of a police officer's on the scene assessment of probable cause to

believe that plaintiff had committed a minor offense.

b. Plaintiff was detained for identification only, she was not being held pending arraignment, bail or trial.

I. PLAINTIFF WAS NOT DETAINED IN THE USUAL FASHION. UNLIKE THE USUAL PRE-ARRAIGNMENT DETENTION, PLAINTIFF'S CUSTODY WAS NOT LAWFUL, NOR WAS IT A CONTINUATION OF HER ARREST.

It was stipulated at trial that defendant Duncan did not have probable cause to cite plaintiff for the crime of furnishing false information (T81-82). In addition, the Ninth Circuit has ruled that plaintiff's custodial arrest for identification purposes on the noncriminal, nonarrestable no proof of fare citation was unconstitutional because it was not authorized by Oregon law.[11] *Cf. Whren v. U.S. 116 S.Ct. 1769 (1996) (stop is constitutional if officers are doing no more than they are authorized to do by law, regardless of ulterior motive).*

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[11] *None of the parties below challenge that holding.*

For that reason, this case is about an illegal arrest and the consequences that flow from it, nothing more. As such it has limited value for explicating a Constitutional standard for lawful detentions--the gap in constitutional protection between a warrantless arrest and the neutral decision by a magistrate that probable cause exists left unaddressed in Graham v. Connor, 109 S.Ct. 1865, 1871, n.10 (1989), has been plugged by a conceptual anomaly.[12]

Plaintiff never lost her Fourth Amendment protection despite the fact that she was arrested and put in jail at MCDC, because her arrest was made without probable cause. Cf. Whiteley v. Warden, 401 U.S. 560, 568, 91 S.Ct. 1031, 28

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[12] *In any event, even if an arrestee in a detention facility does not have Fourth Amendment protection while being booked, protection under a substantive due process post-arrest non-seizure standard should be at least as great as the Fourth Amendment provides, not the Eighth Amendment. See Sweatt v. Bailey, 876 F.Supp.1571, 1581 (M.D. Ala. 1995); see also Titran v. Ackman, 893 F.2d 145, 147 (7th Cir.1990). It would be absurd to suggest that a person being arrested with probable cause has more rights than a person arrested without probable cause simply because excessive force was applied during post arrest detention rather than during arrest. Cf. Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973), cert. denied 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 32 (1988)(absurd to suggest that pretrial detainees do not have protection under the Fourteenth amendment at least as broad as convicted prisoners under the Eighth amendment).*

L.Ed.2d 306 (1971) (defendant did not lose his Fourth Amendment protection from illegal search just because officer who instigated warrant without probable cause relied on other officers to execute the warrant). For purposes of constitutional analysis, plaintiff was neither an arrestee nor a pretrial detainee, she was an innocent citizen wrongfully detained. As such she was entitled to Fourth Amendment protection throughout her stay at MCDC.

Petitioners' attempt to marginalize the Constitutional effect of plaintiff's illegal arrest by insisting that she was presented for custody at MCDC on a jailable misdemeanor offense is misleading. Where probable cause is lacking for an arrest, an officer cannot rely on information received from another officer unless it was objectively reasonable to do so. See Arizona v. Evans, 115 S.Ct. 1185, 1192 (1996) (citing United States v. Henlsley, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985)). Here the paperwork for plaintiff's custodial detention was facially invalid--plaintiff's misdemeanor citation for furnishing false information did not have a companion citation for a misdemeanor offense, only for a noncriminal nonarrestable infraction. In addition, the narrative

in defendant Duncan's custody report contained no articulable facts that would have provided an independent basis for a finding of probable cause to believe that plaintiff committed a crime.

Moreover, petitioner's claim that plaintiff was presented to MCDC staff as a cite-in-lieu is not true. Plain-tiff was labelled a cite-in-lieu only after she was accepted at MCDC. The distinction is significant because MCDC staff, not defendant Duncan, acted deliberately in choosing to process plaintiff as a cite in lieu arrestee despite the fact that she was delivered to MCDC as a probable cause arrestee. That deliberate action, made in contravention of defendant Duncan's facially invalid paperwork, elevates the conduct of the MCDC staff to the equivalent of a separate seizure.

Plaintiff was not the victim of negligent oversight within the continuum of a custodial arrest when she was accepted into custody at MCDC. Therefore, the fact that she was not in defendant Duncan's custody when her claims for excessive force against defendants Kar-cher and Bowdle arose has no bearing on the source of Constitutional protection to which she is entitled. The deliberate actions of the MCDC staff in relying on

defendant Duncan's decision to detain plaintiff when it was objectively unreasonable to do so entitles her to renewed Fourth Amendment protection throughout her detention at MCDC.[13]

II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE CONSTITUTIONAL STANDARD FOR EXCESSIVE FORCE CLAIMS BROUGHT BY DETAINEES HELD PURSUANT TO A WARRANTLESS ARREST.

Petitioners oversimplify the evolving post arrest

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[13] *The enlarged strength of plaintiff's Fourth Amendment argument at this procedural juncture does not diminish the continued vitality of the argument plaintiff made below in the context of a legal arrest--a person arrested for a minor crime who is detained for identification purposes should not be subjected to restraints and conditions of confinement designed for dangerous criminals unless those constraints are reasonably related to the identification process, and reasonably short-lived. Here those conditions of confinement include the denial of a telephone call, of the opportunity to make bail, or to voluntarily submit to fingerprinting or go before a magistrate as an alternative to being incarcerated for identification; the fact that plaintiff was held for four hours, two hours of which she was handcuffed with her hands behind her back, as well as another hour during which she was detained solely for the purpose of having her mug shot taken, even after she had already been identified as who she said she was;and the fact that there was no warning given as to the serious consequences for asking even the most legitimate request of the corrections officers.*

pre-charge de-tainee standard in the circuit courts, and their assertion that there is a conflict among the circuits on this issue is mistaken. The Ninth Circuit's decision in the instant case is in harmony with the law in every circuit that has addressed the question of excessive force in a warrant-less post-arrest pre-Gerstein hearing setting.

The Second Circuit

Although it is true that one of the determining factors in Powell v. Gardner, 891 F.2d 1039 (2d Cir. 1989) and its use of a Fourth Amendment standard on post arrest excessive force was that the detainee was still in the custody of the arresting officer, the court made clear that the test was a minimum standard, noting that the Fourth Amendment applied "at least prior to the time when the person is arraigned or formally charged and remains in the custody...of the arresting officer." Id. at 1044 (emphasis added).

The Fourth Circuit

Petitioner's mischaracterize the legal effect of U.S. v. Cobb, 905 F.2d 1039 (4th Cir. 1990). It was not holding by the Fourth Circuit that the Fourteenth Amendment applies to claims of excessive force against arresting officers during booking. Al-

though the court broadly defined a pretrial detainee as one lawfully arrested and being held prior to a formal adjudication of guilt, it did so in the context of upholding a guilty verdict against the arresting officers. In doing so, the court expressly refused to answer the question of whether the Fourth Amendment or the Fourteenth amendment should apply, noting only that the detainee had met the burden of proof under either the Fourteenth or the Fourth Amendment. Id. at 788, n.7.

Cooper v. Dyke, 814 F.2d 941 (4th Cir.1987), cited by the 4th Circuit in U.S. v. Cobb, supra at 788 is more relevant. In that pre-Graham case, the court framed the standard for non-arrest detention in a substantive due process context, but noted that a significant factor for determining the extent of Constitutional protection was the fact that the detainee had not had a hearing to assess probable cause or to set bail. Cooper v. Dyke, supra at 949.

The Fifth Circuit

Historically, the Fifth Circuit has applied a Fourth Amendment standard on claims of excessive force by a pretrial detainee, although the case law is distorted by the Circuit's former "signifi-

cant injury" requirement on all excessive force claims.[14] *With that understanding in mind, the fact that Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir. 1994), cert. denied ___U.S.___, 115 S.Ct. 639 (1994), applied a substantive due process standard to a detainee's attempted escape only hours after his arrest is not dispositive on the issue.*

Relying on Valencia v. Wiggins, 981 F.2d 1440 (5th Cir.1993), cert. denied ___U.S.___, 113 S.Ct. 2998, 125 L.Ed.2d 691 (1993), the Brothers court assumed pretrial detainee status by noting that the prisoner had been fully processed after his

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[14] *For example, in Bender v. Bromley, 1 F.3d 271 (5th Cir. 1993) one of the cases relied on in Brothers v. Klevenhagen, infra, a detainee who had been beaten without leaving marks only hours after turning himself in for murder, objected to a Fourth Amendment excessive force instruction that was given at trial. His objection can be understood by the fact that Hudson v. McMillan, 503 U.S.___, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992), a case that overturned the significant injury requirement for pretrial detainee claims of excessive force in the 14th Amendment substantive due process context, was pending on certiorari to the Supreme Court during the trial below. Assuming without analysis that the complainant was a pretrial detainee, the Fifth Circuit used Bender v. Brumley, supra at 277-78, to hold that significant injury was no longer an element ofa 14th Amendment excessive force claim under Hudson, supra. Tellingly, the court noted that significant injury was still an element of an arrestee's Fourth Amendment excessive force claim. Bender v. Bromley, supra at 278 n.7.*

arrest. Implicit in this assumption, however, is the fact that detention was justified by outstanding felony and misdemeanor warrants. Significantly, the court allowed that Fourth Amendment protection continues beyond the time of initial apprehension. Brothers, supra at 456.[15] *A warrantless arrest therefore could presumably still support the Fourth Amendment concept of continuing seizure even after booking.*

The Seventh Circuit

Petitioner's reliance on Kinney v. Indiana Youth Center, 950 F.2d 462 (7th Cir. 1991), an Eighth Amendment case, to create a conflict among the circuits pertaining to Fourth Amendment issues is likewise misplaced. The Seventh Circuit rule is clear that in the case of a warrantless arrest the Fourth Amendment applies post-arrest at least until a Gerstein hearing.[16] *See Reed v. City of*

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[15] *The Valencia court left open the possibility that the concept of continuing seizure might be appropriate in other contexts, noting only that the three week detention at issue was too attenuated from the arrest to apply a Fourth Amendment standard.*

[16] *Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) holds that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.*

Chicago, 77 F.3d 1049, 1052 (7th Cir. 1996); Garcia v. City of Chicago, Ill., 24 F.3d 966, 970 n.6 (7th Cir. 1994); Villanova v. Abrams, 972 F.2d 792, 797 (7th Cir. 1992).

The Tenth Circuit

Petitioners correctly state that the Tenth Circuit is squarely on point in Austin v. Hamilton, 945 F.2d 1155 (10th Cir. 1991) and Frohmader v. Wagner, 958 F.2d 1024 (10th Cir. 1992) in deciding that the Fourth Amendment applies to a warrantless post arrest pre-Gerstein hearing detention.

The Eleventh Circuit

Petitioners reference to Vineyard v. County of Murray, GA., 990 F.2d 1207 (11th Cir. 1993) as a case where a Fourteenth Amendment due process standard was applied to a claim of excessive force by an arrestee still in the custody of the arresting officers is not properly framed. In that case, the court clearly noted that application of a Fourth Amendment standard was equally viable, but that determination of the applicable standard was not necessary to uphold the verdict against the officers. Vineyard, supra at 1211. In fact, application of a Fourth Amendment standard against non-arresting officers who beat a DUI detainee

several hours after his arrest was upheld in U.S. v. Myers, 972 F.2d 1566 (11th Cir 1992), cert. denied, ___U.S.____.

III. IT IS NOT REASONABLE TO ALLOW A POLICE OFFICER UNFETTERED POWER TO PUNISH A PERSONS SUSPECTED OF A MINOR OFFENSE BY SUBJECTING THEM TO CONDITIONS AND RESTRICTIONS DESIGNED FOR DANGEROUS CRIMINALS.

The Ninth Circuit has correctly applied the law to this case.[17] *The fact that Farmer v. Brennan,*

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[17] *Petitioners are wrong in claiming that the jury instruction on plaintiff's excessive force claim did not use an eighth amendment standard. Although it is true that pretrial discussion focussed on whether the instruction should be a Fourth or Fourteenth Amendment standard, see Plaintiff's Amended Trial Memorandum, pp.10-12, the instruction given clearly incorporated Eighth Amendment law in defining the Fourteenth Amendment standard that was used at trial. In addition, plaintiff, representing herself pro se in her first trial ever, objected to the use of prison riot language from Whitley v. Albers, 475 U.S. 312 (1986) to the effect that the law allows a prsion guard the right to dispel disturbances, on the explicit grounds that it was an Eighth Amendment standard that should require an actual disturbance prior to being used in a 14th Amendment context (T 761-63). Cf. Wilson v. Williams, 83 F.3d 870, 877 (7th Cir. 1996)(jury instruction allowing for good faith use of force in a disturbance was confusing where there was no separate finding that a jail disturbance in fact existed). The fact that a pretrial detainee is entitled to protection at least as great as the Eighth Amendment protection given*

___U.S.___, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) mandates a dual standard that differentiates between excessive force claims and conditions of confinement claims in an Eighth Amendment context does not preclude a similar dual standard in a Fourth Amendment context: there is ample precedent by which to judge the objective reasonableness of decisions made in haste and under pressure in dangerous situations by analogizing excessive force arrest cases decided under the Fourth Amendment standard in Graham v. Connors, 490 U.S. 386, 109 S.Ct. 1865, 104 L.E.2d 443 (1989) to a prison context; an objective reasonableness conditions of confinement standard already applies in a prison context pertaining to strip searches for minor offenders. See, e.g., Masters v. Crouch, 872 F.2d 1248 (6th Cir. 1989); Watt v. Richardson, 849 F.2d 195 (5th Cir. 1988).

This Court made clear in Graham v. Connor, supra at 1870, that there is no single generic standard for bringing excessive force claims under 42 USC 1983. Similarly, there need be no generic

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convicted prisoners does not mandate use of an Eighth Amendment standard even in a case where a Fourteenth Amendment standard is applied. See, e.g., Telfair v. Gilberg, 868 F.Supp 1396 (S.D. Ga. 1994); Boswell v. Sherbourne County, 849 F.2d 1117, 1121 (8th Cir.1988).

prison standard that applies to every person detained regardless of the constitutional right the detainee seeks to vindicate under 42 USC 1983. Yet that is what petitioners are asking this Court to establish.

After Albright v. Oliver, ___U.S.___, 114 S.Ct. 807 (1994), reh. denied, 114 S.Ct. 1340, there can be no doubt that the Fourth Amendment is the textual source of constitutional protection from which to vindicate a deprivation of liberty in the context of a criminal prosecution. See also U.S. v. James Daniel Good Real Property, 114 S.Ct.492,499 (1993). Moreover, in Graham v. Connor, supra at 1871, the Court repeated its holding in Tennessee v. Garner, 471 U.S. 1 (1985), that the Fourth Amendment covers not only when a seizure is made but how it is carried out. The Ninth Circuit's reliance on Gerstein v. Pugh, supra, and County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) is not misplaced but on the contrary is merely the necessary application of Fourth Amendment law to the facts of how plaintiff's seizure in this case was carried out.

A police officer's on the scene assessment of

probable cause provides legal justification for arresting a person suspected of committing a crime, and for a brief period of detention to take the administrative steps incident to arrest. Gerstein, supra at 863. The steps incident to arrest are complete once the suspect has been booked, photographed, and fingerprinted. County of Riverside v. McLaughlin, supra at 1670-71; cf. Illinois v. Lafayette, 462 U.S. 640, 645 (1983) (taking an arrestee to the police station is no more than a continuation of the arrest).

In Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) the Court did no more than agree that the objectives of insuring a pretrial detainee's appearance in court and in managing a prison were legitimate governmental purposes that could reasonably justify conditions and restrictions imposed on a person lawfully arrested. However, Bell v. Wolfish relied on Gerstein for the definition of a person lawfully arrested--one who has had a judicial determination of probable cause to believe he or she has committed a crime. Supra at 536.

A warrantless arrest does not meet the Gerstein prong of the Bell v. Wolfish test. Prison conditions and restrictions designed to insure a

lawfully arrested pretrial detainee's appearance in court and to facilitate prison management of dangerous criminals are punishment without more when applied to a person for whom there is no probable cause to arrest. For that reason, the imposition of those conditions and restrictions should not be justified solely on a police officer's on the scene assessement of probable cause to believe that a minor crime has been committed and that a person's identity may be in issue.[18]

The Ninth Circuit has correctly stated what the Framers of the Constitution intended and what this Court is charged with upholding: the government may not intrude upon a citizen's personal liberty except in a reasonable fashion. It is not reasonable to allow a police officer the unfettered power to punish a person suspected of a minor

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[18] *Even under the Eighth Amendment, a convicted prisoner cannot be incarcerated under conditions posing a substantial risk of harm. Farmer v. Brennan, supra at 1977. Defendant Karcher's use of force was ratified throughout the MCDC chain of command. It is MCDC policy to treat all detainees, even those detained for identification on minor offenses as serious offenders (T600). The risk of substantial harm to a cite-in-lieu detainee who is not at least warned of this aspect of confinement is obvious, and should be grounds for a constitutional violation where the result is corporal punishment merely for asking legitimate questions such as requesting that evidence be documented or getting the name of an officer who yanked her around by her hair.*

offense by subjecting that person to constraints designed for dangerous criminals, even for a short period of time, unless the conditions of such a seizure are reasonably related to citing the person so detained.

CONCLUSION

Multnomah County's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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